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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 927

[illegible] LAKE PAIUTE TRIBE, Applicant for Intervention--Petitioner,

v.

UNITED STATES, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES C AND D

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. ALPINE LAND AND RESERVOIR COMPANY, et al., Appellees, PYRAMID LAKE PAIUTE TRIBE, Applicant for Intervention-Appellant.	)	No. 24156 JUDGMENT

APPEAL from the United States District Court for the District of Nevada

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 24, 1970

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. ALPINE LAND AND RESERVOIR COMPANY, et al., Appellees, PYRAMID LAKE PAIUTE TRIBE, Applicant for Intervention-Appellant.	No. 24156

On Petition for Rehearing

Before: ROELOFS and DUNIWAY, Circuit Judges, and Crary, District Judge.

The petition for rehearing in the above-entitled matter is denied.

Dated: October 2, 1970

APPENDIX D

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 927

PYRAMID LAKE PAIUTE TRIBE, Applicant for Intervention—Petitioner,

v.

UNITED STATES, et al., Respondents.

PROOF OF SERVICE

I, Martha C. O'Connell, a secretary in the offices of GEORGE P. DUKE, ROBERT S. PELCYGER, DAVID H. GETCHES, DANIEL M. ROSENFELT and F. DAVID GABRIEL of California Indian Legal Services, attorneys of record for petitioner herein, depose and say that on the 17th day of November, 1970, I served a copy of the foregoing

APPENDICES C AND D

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Each envelope was then sealed and deposited in the United States Mail at Escondido, California, air mail postage thereon fully prepaid.

All parties required to be served have been served.

Martha C. O'Connell

Martha C. O'Connell

Subscribed and sworn to before me at Escondido, State of California, this 17th day of November, 19 70.

Patricia J. Wright

Notary Public

PATRICIA J. WRIGHT

PATRICIA J. WRIGHT
NOTARY PUBLIC
Principal Office, San Diego Co., Calif.

My Commission Expires May 14, 1971

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IN THE

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UNITED STATES OF AMERICA, Respondent

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ALPINE LAND AND RESERVOIR COMPANY, et al., Respondents

PYRAMID LAKE PAIUTE TRIBE, Applicant for Intervention--Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Pyramid Lake Paiute Tribe, petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 24, 1970. The opinion appears in the Appendix B hereto.

JURISDICTION

The Ninth Circuit Court of Appeals rendered its judgment on August 24, 1970. Petitioner's request for a rehearing was

denied on October 2, 1970. The mandate of that court has been stayed until November 2, 1970, pending the filing of this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Pyramid Lake Paiute Tribe has an interest in the subject matter of this action sufficient to allow intervention of right pursuant to Rule 24(a), F.R.C.P., to prevent the impairment of its water rights.

2. Whether the Tribe's petition to intervene in this action should be denied on the grounds that it was not timely filed.

RULE INVOLVED

Rule 24(a), F.R.C.P., provides:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

This case is part of the Pyramid Lake Paiute Tribe's effort to halt the destruction of its principal asset and one of the world's great natural wonders, Pyramid Lake.[1] The Tribe has recently initiated a related proceeding in the District Court for the District of Columbia,[2] which will be discussed later in this Statement.

This lawsuit began in 1925 when the United States filed a complaint in the Federal District Court for the District of Nevada seeking a determination of the water rights of the Carson River. At issue here is a motion to intervene in that litigation filed March 4, 1968 by

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[1]For a concise statement of the recent history of Pyramid Lake, of what the Lake means to the Pyramid Lake Paiute Tribe, and of the Tribe's efforts to save the Lake, see the article by Alvin M. Josephy, Jr., entitled "Here in Nevada A Terrible Crime," American Heritage, Vol. XXI, No. 9 (June 1970), at p. 93.

[2]The new proceeding is Pyramid Lake Paiute Tribe v. Hickel, Civil No. 2506-70 (D. D.C. filed August 21, 1970). This Court can, of course, take judicial notice of this action. Brown v. Board of Education, 344 U.S. 1 (1952); Lambert v. Conrad, 308 F.2d 571 (9th Cir. 1962); and Lopez v. Swope, 205 F.2d 8 (9th Cir. 1953).

the Pyramid Lake Paiute Indian Tribe, which occupies the Pyramid Lake Reservation in Nevada. In the center of that reservation is Pyramid Lake, the terminus of the Truckee River, a relatively untouched natural wonder of magnificent beauty. At one time, practically all of that river's water reached Pyramid Lake, and the Truckee River was the source of economy and sustenance of the Pyramid Lake Indians.

In the course of time, encroachments have been made on the water of the Truckee River, reducing its flow into Pyramid Lake and causing severe harm to the fishery, ecology and natural beauty of the lake. The most serious of these encroachments has been the federal Newlands Reclamation Project, which was begun in 1905 and which now irrigates land in Western Nevada through the use of water of both the Carson and the Truckee Rivers. Water which would otherwise flow into Pyramid Lake is now being diverted at Derby Dam from the Truckee River to the Carson River where the water flows to Lahontan Reservoir and into the distribution facilities of the Newlands Project. The sketch attached to the opinion of the court of appeals (Appendix B) shows the Carson-Truckee River watersheds including Lahontan Reservoir, Derby Dam and the Truckee Diversion Canal, Pyramid Lake and the Newlands Reclamation Project area.

The current rate of diversion of Truckee River water to the Carson River is strangling the ecology of Pyramid Lake. Recently, a project has been proposed to divert water from the upper

reaches of the Carson and its tributaries for additional irrigation. This proposal, known as the Washoe Project, would have the effect of decreasing the amount of Carson River water available to the Newlands Project downstream. Newlands would then have to divert increased quantities of water from the Truckee River, causing further damage to Pyramid Lake. See Pub. Law 809, 70 Stat. 775 (1956).

Between 1925, when the action was instituted by the United States, and 1940, evidence was received by a Special Master. In its opening brief, filed in 1941, the United States observed that there were 381 defendants who claimed 646 separate water rights to the Carson River for the irrigation of nearly 50,000 acres of land upstream from the Lahontan Reservoir. Temporary decrees were entered by the court in June, 1949, and March, 1950. Under these temporary decrees, the United States was granted a flow of up to 5,000 cubic feet per second of Carson River water for the generation of power and for the irrigation of 80,000 acres of cultivable land and 50,000 acres of pasture land. The Master appointed to hear the case gave the government a 1902 priority to this water.

The case then entered a period of inactivity, apparently because the parties were more or less satisfied with the administration of the river by the Water Master under the temporary decree. In 1958, amendments were proposed by an appointed "Special Master" to the

"Proposed Final Decree," and these have been the subject of discussions between the parties from time to time since that date.

In 1967, in response to complaints from the Tribe that too much water was being diverted from the Truckee River for the Newlands Project, the Secretary of the Interior issued regulations, 43 C.F.R. § 418. The stated purpose of these regulations is to minimize the diversion of Truckee River water to the Carson River. The Carson and Truckee Rivers have therefore been unitized in law as well as in fact.

On March 4, 1968, the Tribe filed a verified petition for intervention and an answer, counterclaim and cross-claim which set forth much of the history cited above.

The Tribe alleged that the Truckee-Carson Irrigation District, which administers and consumes the federal waters of the Carson and the Truckee Rivers for the Bureau of Reclamation, is required under the authority of federal regulations to make the maximum use of Carson River water before diverting Truckee River water for use in the Newlands Project area in order to make as much water available to Pyramid Lake as possible. The Tribe further alleged that it had a right to some or all of the Truckee River water. It alleged that the United States had contracted with the Truckee-Carson Irrigation District to guarantee 406,000 acre feet of water annually for application to an area greatly in excess of the

historical usage of the Newlands Project even though the Irrigation District had not beneficially used that amount of water and that such an allocation would result in waste. The Tribe further alleged that the Newlands Project wastes a great deal of Carson River water through uncontrolled spill over project reservoirs, leaky transmission facilities, and the irrigation of uncultivated lands and duck marshes, and that this waste caused increased diversions from the Truckee River thereby reducing the amount of water available to the Tribe.

The Tribe's prayer asked that the preliminary adjudication of March 24, 1950 be enforced and that a final decree based on that order be entered.

The Tribe's verified petition to intervene and its accompanying memorandum (the factual portions of which were also expressly included in the verification) stated that the United States, the Tribe's nominal trustee, was not protecting the Paiute Tribe's water rights in the proceedings. The government allegedly was seeking rights and priorities for the Washoe Project which, if granted, would decrease the amount of Carson River water available to the Newlands Project, which in turn would be required to take more of the Truckee water in which the Tribe asserts an interest. The United States was also alleged to have entered into a contract giving the Newlands Project an entitlement of 406,000 acre feet, far in excess of its rights under the decree in United States v. Orr Water Ditch Co., No. A-3 (D. Nev. 1946) and the

interlocutory decree in the instant case.

On November 27, 1968, the Tribe moved for leave to file an amended answer, counterclaim and crossclaim. The amended counterclaim and crossclaim alleged that the Secretary of the Interior had, subsequent to the Tribe's petition to intervene, approved a contract purporting to authorize the irrigation of some 20,000 more acres than had been historically irrigated and attempted to give the Newlands Project an allotment almost twice the size of that to which it was previously entitled. The new pleading sought to make the Secretary of the Interior a party and prayed that all parties be enjoined from putting the new contract into effect.

On January 6, 1969, the court denied the Tribe's petition to intervene without reference to its amended pleading. Senior District Judge Roger F. Foley, after reciting the milestones of this litigation, the last of which was reached in 1958, held that the Tribe's motion to intervene was not timely. He also held that the Tribe did not have a sufficient interest to intervene because "applicant has not exhibited . . . a right to divert water from the Carson River . . . ."

An appeal was taken to the United States Court of Appeals for the Ninth Circuit. That court affirmed the decision of the trial court, denying the motion to intervene on the grounds that the Tribe has no interest in the water of the Carson River and that the application for intervention was not timely

filed. Petitioner's motion for rehearing was denied on October 2, 1970.

On August 21, 1970, the Tribe filed a complaint in the United States District Court for the District of Columbia, Civil No. 2506-70, naming as defendants the Secretary of the Interior and the Attorney General of the United States, which challenges the acts and omissions of the government officials in dealing with, ignoring, and failing to protect the Tribe's water rights. Both the application for intervention in this proceeding and the action recently filed in the District of Columbia relate to the Tribe's efforts to secure sufficient waters from the Truckee River to maintain Pyramid Lake as a fishery and as a stable and viable body of water. On October 23, 1970, the Secretary of the Interior and Attorney General filed motions to dismiss claiming that the court had no jurisdiction to review their challenged acts and omissions and that the Tribe would have to be content with an action for damages in the Indian Claims Commission or the Court of Claims.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A RECENT AND CONTROLLING DECISION OF THIS COURT ON THE ISSUE OF INTERVENTION.

Rule 24(a), F.R.C.P., was revised in 1966 in order to obviate "unduly restricted" constructions of former Rule 24. The advisory committee on the

federal rules stated:

> If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene. [as reported in 4 J. Moore, Federal Practice, at 7 (1968 Supp.)]

The purpose of the 1966 amendment was recognized and given effect by this Court in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967).

Cascade, supra, was an anti-trust case. Because of the difference in subject matter, it is surprising to find that the facts upon which this Court allowed intervention in that case bear a striking resemblance to the facts upon which the court below denied intervention in the instant case. In Cascade, supra, the El Paso Natural Gas Company was ordered to divest itself of its interests in Pacific Northwest Pipeline Corporation. Cascade Natural Gas Corporation was one of many companies that had received its supply of natural gas from Pacific Northwest Pipeline Corporation. Under the divestiture order, Cascade would no longer receive its supply from Pacific Northwest; rather, it would be supplied from a new company to be created. Cascade was concerned that too much of the natural gas supply was being allocated to El Paso Natural Gas Company rather than the new company from which it would be supplied and for that reason Cascade sought to intervene. The lower court denied Cascade's motion to intervene, but this Court reversed

holding that Cascade could intervene as of right.

The posture of the Pyramid Lake Paiute Tribe in this litigation is closely analogous to that of Cascade. Both the Tribe and Cascade faced the prospect of a diversion to third parties of resources vital to them (here water, there gas), and both are concerned that any such diversion be made under circumstances which will not, as a practical matter, jeopardize their legitimate interests. In Cascade, moreover, the company was seeking intervention to protect a business relationship to which it had no pre-existing right. Here, the Tribe is attempting to protect a real property interest which, if lost, will mean the economic and cultural destruction of the Tribe.

In Cascade and this case, the applicants are intervening to protect their own interests by ~~both~~ seeking to enhance the interests of one party to the adjudication as against the interests of others. And in both cases, it did not become clear that the government was not adequately protecting the interests of the applicants for intervention until a significant amount of time had elapsed since the inception of the proceedings. It is clear that the ruling of the court below is in square conflict with the decision of this Court in Cascade. Indeed, summary reversal would seem appropriate.

II. SUMMARY REVERSAL IS APPROPRIATE IN VIEW OF THE REASONING OF THE COURT BELOW, THE AMBIGUOUS POSITION OF THE UNITED STATES, AND ITS OFFICIALS AND THE PENDENCY OF RELATED PROCEEDINGS.

A large part of the opinion of the court below concerns what may at first appear to be an issue that is outside the scope of this proceeding, the relative rights of the Pyramid Lake Paiute Tribe and the Newlands Project to the waters of the Truckee River. The opinion states that the Tribe's interest in the Truckee River has an 1859 priority, compared with the 1902 priority of the Newlands Project, and would be entitled to fulfillment before water could be diverted by the owners of any subsequent interest or rights. The court then holds that the Tribe's claim to unadjudicated rights to the use of waters of the Truckee River for other than agricultural purposes (based on Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546, 600 (1962); and Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918)) are not part of the subject matter of the instant proceeding, which involves the waters of the Carson River.

The Tribe is in basic agreement with the reasoning of the Ninth Circuit. Certainly, if the Tribe does have, as it contends, a right to the waters of the Truckee River for the purpose of maintaining Pyramid Lake that is prior and paramount to any right of the Newlands Project to the same waters, nothing that

happens in this proceeding could have an adverse effect.

However, neither the United States nor its appropriate officials, the Secretary of the Interior and the Attorney General, have yet taken the position that the rights of the Newlands Project to Truckee River water are necessarily junior to the right of the Tribe to sufficient Truckee River water for the purpose of maintaining Pyramid Lake as a fishery and as a stable and viable body of water.[3] In fact, the Secretary has recently argued that he has discretion to divide up the waters of the Truckee River among these competing claimants as he sees fit and that the Tribe cannot maintain a suit for relief that will save Pyramid Lake, but is limited to an action for damages in the Indian Claims Commission or the Court of Claims.[4]

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[3]The United States might claim that the Newlands Project has acquired a right to the waters of the Truckee River that supercedes the Tribe's right either by virtue of the legislation authorizing the Newlands Project or as a result of the decree entered in the case of United States v. Orr Water Ditch Co., No. A-3 (D.C. Nev. 1946), or on some other basis.

[4]The Secretary's position is stated in his motion to dismiss in Pyramid Lake Paiute Tribe v. Hickel, supra, now pending in the United States District Court for the District of Columbia.

The reason the relative rights of the Tribe and the Newlands Project to Truckee River water are so important is that it would not be possible to deny the Tribe's "practical" interest in the subject matter of this proceeding if it were admitted that the Tribe's claimed Truckee River rights could be affected by its outcome. The Tribe is seeking to intervene in this case for one reason--to obtain the greatest possible right for the Newlands Project to Carson River waters, thereby reducing or eliminating the Newlands' claim on the Truckee. So long as the measure of the Newlands' claim on the Truckee depends on the outcome of this case, the Tribe's "practical" interest is obvious.[5] Rule 24(a)(2), F.R.C.P., as interpreted in Cascade Natural Gas v. El Paso Natural Gas, supra, simply would not permit the Tribe to be excluded from this adjudication unless it could be demonstrated, as the court below purports to do, that under no circumstances could the Newlands Project obtain a right superior to the Tribe's to the flow of the Truckee River.

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[5]In fact, in its complaint in Pyramid Lake Paiute Tribe v. Hickel, supra, the Tribe alleges that there would be sufficient water naturally available to the Newlands Project from the Carson River to irrigate the acreage that has historically been under cultivation if the enormous waste of water was eliminated.

In these circumstances, it is unconscionable[6] for the United States and

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[6]Unconscionability with respect to the government's obligations as trustee to preserve and protect Indian water rights is certainly not unique to the Pyramid Lake controversy. Similar conflicts of interest abound. See the very excellent and comprehensive article which includes a section on Pyramid Lake by William H. Veeder, a former Justice Department attorney now with the Bureau of Indian Affairs, entitled "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," JOINT ECONOMIC COMM., TOWARD ECONOMIC DEVELOPMENT FOR NATIVE AMERICAN COMMUNITIES, JOINT COMM. PRINT VOL. 2, 91st Cong., 1st Sess. 460-518 (1969).

The President of the United States, in a very recent, forthright statement to the Congress, concludes that present institutional arrangements are calculated to preclude effective representation by government attorneys of Indian water rights because of the government's overwhelming conflicts of interest. The President also points out that when conflicts arise, Indians are almost invariably the losers. President's Message on Indian Affairs, U.S. Code Cong. & Admin. News, No. 8, pp. 2965, 2972 (1970). The performance of the government in the Pyramid Lake controversy does nothing to detract from the accuracy of the President's position.

its officers to remain silent. If the government disagrees with the reasoning underlying the Ninth Circuit's opinion, it should say so and cease its opposition to the Tribe's intervention. If it is in agreement, and will enter into a stipulation to the effect that the Newlands Project rights to Truckee River water are necessarily junior to the adjudicated and unadjudicated rights of the Pyramid Lake Paiute Tribe, the Tribe will withdraw its petition for intervention in this proceeding. Either way, the government should stop playing "now you see it--now you don't" games at the Tribe's expense. If it persists in its silence on this vital question and argues for the denial of this petition for certiorari and permanent exclusion of the Tribe from this proceeding, this case should be summarily reversed and remanded pending a final resolution of the relative rights of the Tribe and the Newlands Project to the waters of the Truckee River.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS BY OTHER COURTS OF APPEAL INTERPRETING THE SCOPE OF RULE 24(a).

The court below's ruling that the Tribe's interest in the subject of the litigation was not sufficient to entitle it to intervene under Rule 24(a) is in conflict with decisions construing Rule 24 in other circuits. In Smuck v. Hobson, 408 F.2d 175 (C.A. D.C. 1969), the court of appeals for the District of Columbia ruled that parents of school children in the District of Columbia school system were entitled to intervene to appeal the

final judgment of the trial court entered against the Board of Education and school superintendent after an unusually complex and lengthy trial. The judgment affected various policies of the School Board in regard to de facto segregation, and the court of appeals held that the parents had sufficient interest in the litigation to intervene as a matter of right. See also Nuesse v. Camp, 385 F.2d 694 (C.A. D.C. 1967). A similarly broad construction was adopted by the Fifth Circuit in Atlantis Development Corporation v. United States, 379 F.2d 818 (5th Cir. 1967). And in another recent case that is closely analogous to the case at bar, it was held that the Village of Tarrytown had sufficient "practical" interests to challenge the issuance of a permit for part of an Expressway along the Hudson River, even though Tarrytown's interest related to another part of the Expressway that would eventually pass through the Village. Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970).[7] Like the village of Tarrytown, the Tribe is seeking to avoid the substantial impact on its Truckee River rights of the consequences that would flow from a judgment unduly restricting

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[7]In Citizens Committee for Hudson Valley v. Volpe, supra, the Village of Tarrytown was a co-plaintiff so the case did not involve Rule 24. However, it is clear that if a party has sufficient interest to sue, he certainly has a sufficient "practical" interest for purposes of intervention.

the Newlands' rights to the Carson River.

Instead of applying Rule 24(a) in accord with the clear intent of the Advisory Committee, supra, and the holding of this Court in Cascade, supra, the court below apparently looked to the old mechanical test embodied in Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961), of whether the applicant "is or may be bound" by a decree rendered in his absence.

The decision below seriously undermines the 1966 amendments to Rule 24(a), and stands starkly by itself among decisions of the courts of appeal in narrowly limiting the permissible scope of intervention as of right. There is need for further guidance from this Court to resolve this conflict in the circuits.

IV. TIMELINESS IS NOT A BAR TO THE TRIBE'S INTERVENTION.

Rule 24(a) requires that an application for intervention as a matter of right must be timely filed. The issue of timeliness is usually considered in conjunction with the other requirements of Rule 24(a)(2), that the applicant have an "interest" in the transaction, that he may be impeded in protecting his interest by the action, and that his interest is not adequately represented by others. Smuck v. Hobson, supra.

As shown in part II of this section, unless the government is willing to stipulate that the Newlands Project's rights to Truckee River water are junior to the Truckee River rights of the Tribe, the Tribe's substantive water rights

final judgment of the trial court entered against the Board of Education and school superintendent after an unusually complex and lengthy trial. The judgment affected various policies of the School Board in regard to de facto segregation, and the court of appeals held that the parents had sufficient interest in the litigation to intervene as a matter of right. See also Nuesse v. Camp, 385 F.2d 694 (C.A. D.C. 1967). A similarly broad construction was adopted by the Fifth Circuit in Atlantis Development Corporation v. United States, 379 F.2d 818 (5th Cir. 1967). And in another recent case that is closely analogous to the case at bar, it was held that the Village of Tarrytown had sufficient "practical" interests to challenge the issuance of a permit for part of an Expressway along the Hudson River, even though Tarrytown's interest related to another part of the Expressway that would eventually pass through the Village. Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970).[7] Like the village of Tarrytown, the Tribe is seeking to avoid the substantial impact on its Truckee River rights of the consequences that would flow from a judgment unduly restricting

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[7] In Citizens Committee for Hudson Valley v. Volpe, supra, the Village of Tarrytown was a co-plaintiff so the case did not involve Rule 24. However, it is clear that if a party has sufficient interest to sue, he certainly has a sufficient "practical" interest for purposes of intervention.

the Newlands' rights to the Carson River.

Instead of applying Rule 24(a) in accord with the clear intent of the Advisory Committee, supra, and the holding of this Court in Cascade, supra, the court below apparently looked to the old mechanical test embodied in Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961), of whether the applicant "is or may be bound" by a decree rendered in his absence.

The decision below seriously undermines the 1966 amendments to Rule 24(a), and stands starkly by itself among decisions of the courts of appeal in narrowly limiting the permissible scope of intervention as of right. There is need for further guidance from this Court to resolve this conflict in the circuits.

IV. TIMELINESS IS NOT A BAR TO THE TRIBE'S INTERVENTION.

Rule 24(a) requires that an application for intervention as a matter of right must be timely filed. The issue of timeliness is usually considered in conjunction with the other requirements of Rule 24(a)(2), that the applicant have an "interest" in the transaction, that he may be impeded in protecting his interest by the action, and that his interest is not adequately represented by others. Smuck v. Hobson, supra.

As shown in part II of this section, unless the government is willing to stipulate that the Newlands Project's rights to Truckee River water are junior to the Truckee River rights of the Tribe, the Tribe's substantive water rights

stand to be adversely affected by the results of this adjudication. Therefore, the decision of the court below upholding the denial of the Tribe's application for intervention on timeliness grounds does have the effect of cutting off the Tribe's substantive rights because of the passage of time. Such cases as United States v. Ahatanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), Skeem v. United States, 273 F. 93 (9th Cir. 1921), United States v. Brookfield Fisheries, 24 F.Supp. 172 (D. Ore. 1938), and United States v. Hibner, 270 F. 909 (D. Idaho 1928) stand for the heretofore unquestioned proposition that Indian water rights cannot be lost by a Tribe's failure to assert them. Yet the government would have this Court make an exception to the standard rule and hold that Rule 24 contains a trap in which the United States Government, by breaching its duty to protect the Tribe's interests, can destroy Indian rights which could not otherwise be lost. "Timeliness" should not bar the Tribe's claim to its water.

This Court has not yet established guidelines for determining the issues of timeliness under Rule 24. According to Moore, the problem of the late intervener shades off into the problem of his status. 3B J. Moore, Federal Practice § 24.13[1] (1969). It may well be the case that the late intervener is not entitled to undo everything that has gone on prior to his application for intervention. Surely the problem should be analyzed in terms of reconciling the liberal scope for intervention as of right under new Rule 24(a) with the efficient administration

of pending matters. Yet neither the trial court nor the court of appeals considered the terms on which intervention could be allowed in this case without prejudicing the rights of the parties.[8]

In the United States v. Blue Chip Stamp Co., 272 F.Supp. 432 (C.D. Cal. 1967), aff'd sub nom. Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968), a motion to intervene after entry of a consent decree in an anti-trust action was held untimely on the grounds that the petitioners knew the existence of the negotiations leading to the final decree and should have moved to intervene prior to the entry of that decree to have their interests considered in its formulation. Such is the status of the instant litigation and that is precisely what the Tribe is trying to do. The full extent of the harm to the Tribe's water rights will not be known until the final decree is entered in the district court.

Until very recently in the history of this lawsuit, the Tribe had no reason to believe its rights were not being adequately represented by the United States. Since 1967, it has become increasingly clear to the Tribe that the

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[8]Other courts have held that intervention is even proper after judgment citing Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960); Pellegrino v. Nesbite, 203 F.2d 463 (9th Cir. 1953); Smuck v. Hobson, 408 F.2d 175 (1969); see 3B J. Moore, Federal Practice § 24.13 (1969).

United States is laboring under a conflict of interest in this litigation, and does not intend to protect the Tribe's right to Truckee River water. It would be a cruel hoax upon the already impoverished Pyramid Lake Paiute Indians to deny them their day in court on the assumption that their vital substantive rights are not involved in this proceeding when the possibility exists that another court will rule that their rights have been lost or that they are beyond judicial redemption.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated: October 30, 1970

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

* * * * *

UNITED STATES OF AMERICA, Plaintiff, vs. ALPINE LAND & RESERVOIR COMPANY, a corporation, et al., Defendants. PYRAMID LAKE PAIUTE TRIBE, Applicant in Intervention.	No. D-183 ORDER ON MOTION OF PYRAMID LAKE PAIUTE TRIBE TO INTERVENE AS A DEFENDANT, COUNTERCLAIMANT AND CROSS-CLAIMANT

The Pyramid Lake Paiute Tribe of Indians on March 4, 1968, filed a Motion to Intervene as a Defendant, Counterclaimant and Crossclaimant. The Motion recites:

> "The Pyramid Lake Paiute Tribe moves for leave to intervene as a defendant, counterclaimant and crossclaimant in this action in order to assert the defenses and claims set forth in its proposed answer, counterclaim, and crossclaim, a copy of which is attached to this motion and is incorporated herein. Applicant has an interest in the subject-matter of this lawsuit, the representation of its interest by existing parties is inadequate, the disposition of this action may impair applicant's ability to protect its interest, and applicant's position has questions of law and fact in common with the issues in this action."

Applicant's Motion to Intervene and the above papers were fastened together and were filed as one document with the Clerk of the above entitled Court on March 4, 1968.

APPENDIX A

Applicant's first point is that it is entitled to intervene as a matter of right under Fed. Rules Civ. Proc. rule 24(a), 28 U.S.C.A. On page 3 of applicant's memorandum filed with its motion, the portion of Rule 24(a) relied upon is set forth as follows:

> "Rule 24(a), Federal Rules of Civil Procedure, provides in part:
>
> "'Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.'"

In support of its contention, applicant, beginning at line 18 of page 3 of its memorandum filed with the motion, states the following:

> "The following considerations warrant a finding that applicant is entitled to intervene as a matter of right under this rule.
>
> "A. <u>The Representation of Applicant's Interest By Existing Parties is Inadequate</u>.
>
> "1. <u>Applicant's Interest in this lawsuit</u>.
>
> "This lawsuit seeks to determine priorities to water of the Carson River Basin. The final decree which the Court will enter in this case will vitally affect economic and proprietary interests of the Paiute Indians. The decree may impair the rights of the Paiute Indians in the Truckee River, and in the absence of applicant's intervention, applicant will be unable to protect its interest in that stream, which is used in conjunction with the Carson River in irrigating the Federal Newlands Reclamation Project."

Plaintiff, United States of America, on April 19, 1968, filed its "Memorandum of Reasons and Points and Authorities in Opposition to Intervention of Pyramid Lake Paiute Tribe." Beginning on page 1 of its said memorandum, the plaintiff asserts the following stated reasons as grounds of

its opposition to the motion of Pyramid Lake Paiute Tribe of Indians to intervene:

"The application to intervene is not timely.

"The United States denies that Applicant has an interest in the subject matter of this action, as required by Rule 24(a), F.R.Civ.P.

"What interest Applicant does have in Truckee River diversions, however, is adequately represented by the United States.

"Applicant, having no right to intervene in this suit, would, should it be allowed to do so, divide the management of plaintiff's suit." [See B. on page 9 through page 13 of plaintiff's said memorandum.]

"In addition, there would be no abuse of discretion if the court denied intervention under Rule 24(b), F.R.Civ.P."

In support of its contention that the application of Pyramid Lake Paiute Tribe is not timely, the plaintiff, United States of America, beginning on line 3 of page 2 of its memorandum filed April 19, 1968, argues and states the following:

"Timeliness

"Both Rules 24(a) (Intervention of Right) and 24(b) (Permissive Intervention) provide that intervention should be timely. A serious question is raised by the date of the application to intervene, which comes 43 years after the commencement of the suit:

"(a) Service was had upon the defendants in 1925. The complaint was filed May 11, 1925.

"(b) The trial of the case has been long completed. Evidence was taken from 1929 to 1941. The evidence was closed in 1941.

"(c) The United States filed its trial brief stating its position in the case based on the record on or about December 6, 1944.

"(d) On March 24, 1950, the court entered an order titled Preliminary Determination and Adjudication and Temporary Restraining Order and also appointed a water master to administer the river in accordance therewith.

"(e) On September 18, 1951, Special Master

John V. Mueller filed his Findings of Fact, Conclusions of Law and Decree. On July 14, 1958, Mueller filed amendments to his Findings, etc.

> "All that remains to be done in this case, as the court is aware, is to make certain substitutions, dispose of pending motions, and to enter a final decree. With the aid of the Water Master, Claude Dukes, the United States has prepared a list of substitutions which is substantially complete. In addition, plaintiff is presently engaged in what we believe to be fruitful negotiations with attorneys for the defendants to resolve a form of final decree that will eliminate the need for the filing of formal objections to the master's report.
>
> "Whether, in light of all the above, the Applicant's motion is timely is highly doubtful."

In view of the foregoing, it is apparent that the motion to intervene is not timely as required by Fed. Rules Civ. Proc. rule 24(a), 28 U.S.C.A., and for the reason stated above, the Court should and does hereby deny the motion of the Paiute Indians to intervene in this action. However, the Court feels it proper to consider each and all of the grounds of the plaintiff's objections to the motion.

In support of its denial that the applicant for intervention has an interest in the subject matter of this action as required by Fed. Rules Civ. Proc. rule 24(a), plaintiff, United States, beginning on page 3, line 8 of its memorandum in opposition to said petition for intervention, states:

> "Applicant's Interest
>
> "Rule 24(a), F.R.Civ.P. (Intervention of Right) provides for intervention, inter alia, 'when the applicant claims an interest relating to the property or transaction which is the subject of the action. . . .' The United States denies that applicant has an interest in the property (or transaction) which is the subject of this litigation of the type embraced within the meaning of the words quoted from Rule 24(a). The United States admits that Applicant does have an interest in diversions from the Truckee River, but the rights to make those diversions are the subject matter of another, and not of this, action. They are not in litigation here and cannot be affected by the final decree in this case."

The Court agrees with the plaintiff that applicant has not exhibited to the Court any right to divert water from the Carson River and, therefore, has not established that it is entitled to intervene herein under the provisions of Fed. Rules Civ. Proc. rule 24(a)(2), 28 U.S.C.A.

The Court also agrees that any interest applicant may have in Truckee River diversions is adequately represented by the United States.

NOW, THEREFORE, for the reasons stated in plaintiff's memorandum in opposition to intervention of Pyramid Lake Paiute Tribe and from a consideration of all the matters presented, the motion of said Paiute Tribe to intervene in this action should be, and is hereby, DENIED.

DATED: This 3d day of January, 1969.

Roger D. Foley

U. S. Senior District Judge.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

ALPINE LAND AND RESERVOIR COMPANY, et al.,

Appellees,

PYRAMID LAKE PAIUTE TRIBE,

Applicant for Intervention-Appellant.

No. 24,156

Appeal from the United States District Court
for the District of Nevada

Before: KOELSCH and DUNIWAY, Circuit Judges,
and CRARY, District Judge. *

CRARY, District Judge:

The Pyramid Lake Paiute Tribe (hereafter The Tribe) appeals from the Order of United States District Judge Roger T. Foley, District of Nevada, filed January 6, 1969, denying motion of The Tribe to intervene as a defendant, counter-claimant and cross-complainant.

The Tribe sought to intervene by motion filed March 4, 1968, seeking adjudication of "the relative rights of all parties to this suit in and to the water of the Carson River and its tributaries." The motion to intervene was denied by the Court on the grounds that (1) it was not timely within the provisions of Rule 24(a), Federal Rules of Civil

* Honorable E. Avery Crary, United States District Judge, Central District of California, sitting by designation.

APPENDIX B

Procedure; (2) The Tribe has no interest in the waters of the Carson and, therefore, is not possessed of the requisite interest relating to the property or transaction which is the subject of the action, as required by Rule 24(a) and (b), supra; and (3) any interest The Tribe might have in the Truckee River water which might be the subject of diversion is adequately represented by the United States.

This Court concludes that, for the reasons hereafter discussed, The Tribe's motion to intervene was not timely made nor does The Tribe have the requisite interest in the subject matter of the instant litigation to entitle it to intervene.

FACTUAL BACKGROUND

The within action was instituted by the United States in 1925 in the United States District Court, Nevada District, against more than four hundred original defendants to quiet title to the Government's rights and to fix the relative rights of the defendants to Carson River waters. Evidence was received by a Special Master between 1929 and 1940. In its Opening Brief, filed in 1941, the United States observed that there were 381 defendants who claimed 646 separate water rights to the Carson River for the irrigation of 49,700 acres of land upstream from the Lahontan Reservoir. See the attached sketch of the Carson-Truckee River watersheds including Lahontan Reservoir, the Truckee Diversion Canal, Pyramid Lake and the Newlands Reclamation Project area, Exhibit A to this opinion.

In June, 1949, the District Court entered a Temporary Decree and appointed a Water Master to administer the Carson River. A second Order, almost identical with that filed in June, 1949, was filed on March 24, 1950. These orders, and the appendix and exhibits thereto, incorporated therein by reference, are referred to as the "Temporary

Decree." The Water Master has administered the Carson River waters under this Decree to the present time.

The Tribe, by its motion to intervene and pleadings filed in March, 1968, claimed it had water rights in the Truckee River and in Pyramid Lake. It seeks adjudication of the relative rights of all parties to the suit to the waters of the Carson and its tributaries and the enforcement of the "Temporary Decree" by the Water Master. On November 27, 1968, The Tribe moved to amend its pleadings requesting that the Secretary of Interior be made a party to the action.

The Tribe asserts that the Carson and Truckee rivers have been unitized under Regulations, 43 C.F.R. 418.1-5, and Order of the Under-Secretary of the Interior (32 Fed. Reg. No. 190, page 13733, Sept. 30, 1967) issued in February and September, 1967, and by the operation of the Newlands Reclamation Project, including the Truckee River Diversion Canal, whereby, under given circumstances, water would be diverted from the Truckee River to the Lahontan Reservoir on the Carson River. With respect to the use of waters for the Newlands Project, the Regulations (Section 418.3) adopted by the Department of Interior in 1967, supra, required maximum use of Carson waters in satisfaction of the Truckee-Carson Irrigation District water entitlements and the minimizing of the diversion of the flow of Truckee waters to the Lahontan Reservoir for said District's use in order to make available to Pyramid Lake as much water as possible. The Newlands Project was and is operated by the said Irrigation District for and on behalf of the Government. Commenced in 1905, the Project was constructed by the Department of Interior under the Reclamation Act of June 17, 1902. [32 Stats. 388.] It lies downstream from the Lahontan Reservoir.

In support of its motion to intervene, The Tribe relies on its right to or interest in the waters of the Truckee as determined in the Decree in the case of United States vs. Orr Water Ditch Co., No. A-3, District Nevada, 1946. That Decree declared the rights of the United States to Truckee River waters and the rights of the United States as to water from the Truckee River for the Newlands Project with a priority of 1902. It also decreed specified water rights in the Truckee for The Tribe for irrigation of certain lands on the Pyramid Lake Indian Reservation. This award had a 1859 priority and consequently vested in The Tribe water rights in the Truckee which take precedence over the rights to Truckee waters for the Newlands Project.

The United States has been and continues to seek, by negotiation, the largest water entitlement from the Carson River it can obtain for the Lahontan Reserveir, from which water is taken for the Newlands Project.

THE MOTION TO INTERVENE WAS NOT TIMELY FILED

Rule 24(a), Federal Rules of Civil Procedure, provides for the right to intervene "upon timely application." As noted above, The Tribe's motion to intervene was filed some forty-three years after the filing of the complaint and about twenty-seven years after the trial was concluded, and after the demise of most of the witnesses who testified from memory concerning early appropriations of Carson River waters.

The Tribe urges that it was first authorized to sue in its behalf by the enactment of Title 28, United States Code, § 1362, in 1966. That Section provides that the District Courts shall have original jurisdiction of all civil actions brought by any Indian Tribe or Band, with a governing body duly recognized by the Secretary of the Interior, wherein the controversy arises under the Constitution, laws or treaties of the United States. The aid of Section 1362 was

not required to afford The Tribe the right to intervene in the within action, where jurisdiction was already vested in the Court, if the Tribe possessed the requisite interest in the subject matter of the suit. The Section was for the purpose of giving jurisdiction to United States District Courts of certain civil cases brought by Indian Tribes in their own name in the said courts where but for the statute the Court would not have had jurisdiction for lack of required amount in controversy, or otherwise. See Yoder vs. Assiniboine and Sioux Tribes of Fort Peck Ind. Res., 339 F.2d 360 (9 C.A. 1964), where there was lack of jurisdictional amount in controversy, and Scholder vs. United States, 9th Circuit, June 22, 1970, No. 24,306.

The Tribe also asserts that the Regulations, 43 C.F.R. 418.1-5, supra, which unitized the Carson and Truckee rivers were not issued until February, 1967, and that it did not, until that time, have reason to conclude that the United States was not representing its interests. It further contends that Rule 24, supra, does not apply to Indians.

The Regulations and Order, supra, relate only to the rights of the United States. They clearly provide for the benefit of The Tribe in that they maximize the use of Carson waters and minimize the diversion of Truckee waters for the Truckee-Carson Irrigation District's water entitlement. Neither the Regulations nor the Order indicate that The Tribe's interests were not being represented by the United States.

The "timely application" requirement of Rule 24 applies to Indians as well as other litigants. The Rule concerns a procedural matter and is not a statute of limitation barring substantive rights. The instant action is not one wherein The Tribe is about to lose water rights for failure to assert them. No water rights of The Tribe are

being adjudicated by the Court in the instant case, it was true in the cases cited by appellant Tribe in support of its contention that the Tribe's motion to intervene was timely.

For example, the case of United States vs. Oklahoma Irrigation District, 336 F.2d 321 (9 C.A. 1964), cited by the appellant, involved a suit filed by the United States as Trustee for an Indian Tribe to quiet title to the Indians' right to use waters of a creek elegantly reserved by treaty between the United States and the Tribe. The Court held that in the circumstances no defense of laches, estoppel, or delay, was available to defendants, observing at page 334 of the opinion that the law forbids acquisition of Indian lands, or any title or claim thereto, except by treaty or convention. The claims were to the waters in suit.

At the time the Tribe's motion to intervene was filed the Court was advised by the Government in its memorandum of points and authorities in opposition to intervention filed April 19, 1968:

> "All that remains to be done in this case, so the court is aware, is to make certain substitutions, dispose of pending matters, and to enter a final decree. With the aid of the Water Master, Claude Dukes, the United States has prepared a list of substitutions which is substantially complete. In addition, plaintiff is presently engaged in what we believe to be fruitful negotiations with attorneys for the defendants to resolve a form of final decree that will eliminate the need for the filing of formal objections to the master's report."

Judge Foley points to the facts quoted above in his Order denying the Tribe's motion to intervene.

This Court concludes that the Tribe's motion to intervene was not timely made within the provisions of Rule 24(a) or (b), Title 28, United States Code.

THE TRIBE IS WITHOUT INTEREST IN THE GIRARD RIVER WATERS

The Tribe asserts that by reason of the untitled operation of the Carson and Truckee rivers and the provision for diversion of Truckee waters to the Carson to replace Carson waters used for the Newlands Project, that the Tribe's water rights in the Truckee River are involved.

The pending suit is to quiet title to water rights of the parties to the within action in only Carson River waters. The Tribe has no interest in the subject of this suit and its water rights to the Truckee River are not involved.

The Tribe may have water rights in the Truckee other than its rights to irrigation water from the Truckee, as determined by the Court in United States vs. Orr Water Ditch Co., supra, under the principle announced in Winters Doctrine, Winters vs. United States, 207 U.S. 564 (1908).

In Arizona vs. California, 373 U.S. 546, 600 (1963), the Supreme Court stated:

> "The Court in Winters concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. Winters has been followed by this Court as recently as 1939 in United States v. Powers, 305 U.S. 527. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the

Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are 'present perfected rights' and as such are entitled to priority under the Act.

"We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."

The Tribe contends that the Winters Doctrine has been expanded, citing Arizona Pistachio Growers vs. United States, 352 U.S. 75, 80 (1956) (fishing rights); and Cappaert vs. California, supra.

If the Tribe has water rights in the Truckee not vested by the Decree in the Orr Water Ditch Co. case, supra, they may not properly be asserted or adjudicated in the within litigation. The terms of any possible additional rights of the Tribe to the waters of the Truckee are not before this Court and we make no determination thereof.

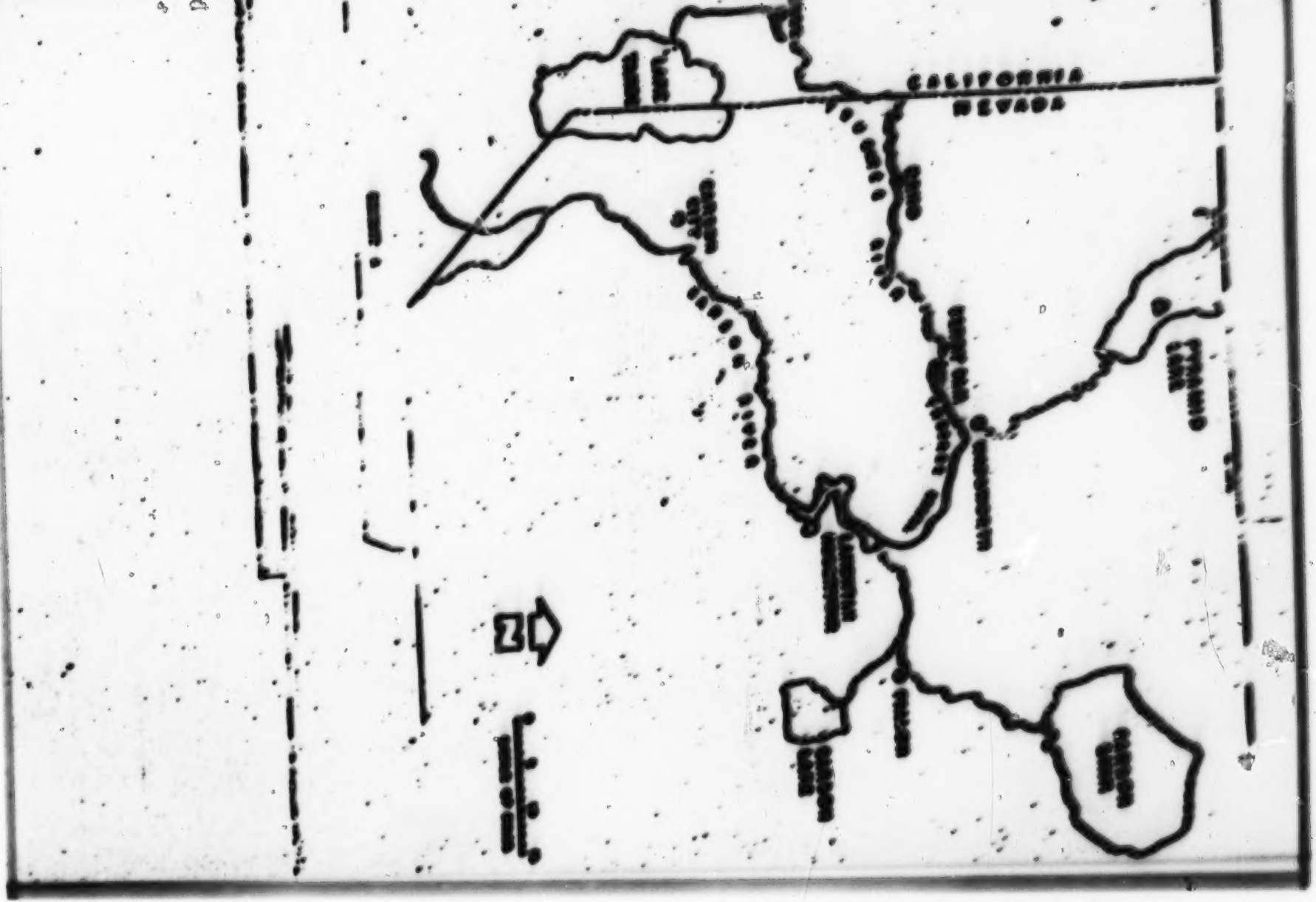
The Court concludes that Nevada Oxygen Gas vs. Ely Farm Oxygen Gas, 336 U.S. 189 (1949), relied on by appellant, does not support the Tribe's position that it is affected within a "practical sense" under Rule 24(a)(2), Federal Rules of Civil Procedure. In the Nevada case, the Court held that the State of California and the Southern California Edison Company were entitled to intervene under Rule 24(a)(2) because they had an interest in the competitive system which the matters in the first appeal in that case was designed to protect and which was being "adversely affected", within the meaning of the Rule, by a

sought. Uintah was allowed to intervene under Rule 24(a)(2) by reason of its interest in the "transaction which is the subject of that action." (Opinion, p. 135.) Such applicant, the Court said, had an interest in the subject of the litigation which was entitled to protection. In the case at bench, the Tribe has no water rights in the Carson River and its claimed right in the Truckee cannot be affected by the Decree adjudicating water rights in the Carson.

The Tribe's reliance on United States vs. Morris, 243 F.2d 708 (10 C.A. 1958), is not well founded, as the intervenors in that case claimed a right to overflow waters of the Colorado River, the waters of which were the subject of a suit. The action was by the United States and sought an adjudication of water rights effected by a water diversion project financed with federal funds. The intervenors, owners of ranch lands which lost the benefit of natural irrigation from overflow of the Colorado River, sought recovery for injuries sustained. Unlike the facts in the Morris case, the Tribe's rights to Truckee water have not been diverted by the diversion of Truckee water to the Carson (Lahontan Reservoir).

The Tribe does not show how any settlement of this case will in any way alter its rights or interest in the waters of the Truckee as established by the Decree in United States vs. Orr Water Ditch Co., supra, or otherwise. As noted above, The Tribe's interest in the Truckee has an 1859 priority and will be filled before water could be diverted by the owners of any subsequent interest or right. Any diversion to the Newlands Project, or subsequent project, which would conflict with the senior rights of The Tribe, would be a violation of the "Truckee River Decree", entered in the Orr Water Ditch Co. case.

The Order of the Supreme Court denying the appellant Tribe's motion to intervene in the within action is affirmed.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In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA,
Respondent,

vs.

ALPINE LAND AND RESERVOIR COMPANY, et al.,
Respondents,

PYRAMID LAKE PAIUTE TRIBE,
Applicant for Intervention-Petitioner.

Case No. 927

Brief of Respondents, E. P. Dangberg Land and Livestock Company, Sierra Pacific Power Company, Fred Dressler and Jolaid Winters in Opposition to Petition for Writ of Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA,
Respondent,

vs.

ALPINE LAND AND RESERVOIR COMPANY, et al,
Respondents,

PYRAMID LAKE PAIUTE TRIBE,
Applicant for Intervention-Petitioner.

Case No. 927

Brief of Respondents, H. F. Dangberg Land and Livestock Company, Sierra Pacific Power Company, Fred Dressler and Johnd Winters in Opposition to Petition for Writ of Certiorari.

The respondents H. F. Dangberg Land and Livestock Company, Sierra Pacific Power Company, Fred Dressler and Johnd Winters oppose the granting of a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit which denied intervention of the Pyramid Lake Paiute Tribe. The respondents are dissatisfied with the petitioner's statement of the questions presented for review and with the petitioner's statement of the case. They restate the questions and the case as follows:

STATEMENT OF THE QUESTIONS FOR REVIEW

1. Was the petitioner's motion to intervene timely filed?

2. Does the petitioner claim an "interest" in the subject of this action within the meaning of Rule 24(a) (2), Rules of Federal Procedure?

3. Assuming an "interest" arguendo, may the disposition of the action "impair or impede" the ability of the petitioner to protect that interest wthin the meaning of the rule?

SUPPLEMENTAL STATEMENT OF THE CASE

These respondents deem it necessary to correct inaccuracies and to supply omissions in the petitioner's statement of the case.

The statements regarding, (1) threatened destruction of Pyramid Lake, (Pet. Br. p. 3), (2) encroachments causing severe harm to the fishery, ecology and natural beauty of the lake, (Pet. Br. p. 4), (3) the current rate of diversion strangling the ecology of the lake, (Pet. Br. p. 4), (4) the effect of the Washoe Project on the lake, (Pet. Br. p. 5), and (5) the effect of the regulations of the Secretary of the Interior, (Pet. Br. p. 6), are not factual and are not in the record in this case. Such statements are not pertinent to the issues before this Court.

The petitioner's statement omits the important fact that the Carson River, the adjudication of the waters of

which are the subject of this litigation, and the Truckee River in which the petitioner claims water rights are two independent water sources each rising in the State of California and flowing eastwardly into Nevada. Neither is a tributary of the other, the only physical connection being a canal into which Truckee water is diverted at Derby Dam and carried to the Carson River. The dam and canal are features of the Newlands Reclamation Project. Because of the topography water cannot be diverted from the Carson River and carried to the Truckee River. As indicated in the sketch, Exhibit A to the opinion of the Court of Appeals, (Pet. Br. App. B.), the Truckee River flows into Pyramid Lake and the Carson River flows into the distant Carson Lake and Carson Sink.

The Newlands Reclamation Project was constructed by the Department of the Interior under the Reclamation Act of June 17, 1902, (32 Stat. 388). Investigation of the project began in 1902. It is alleged in the complaint that the Secretary of the Interior was then, (1925), completing the construction of the project. The project lands, located along the lower Carson River, are irrigated by diversions of water from the Carson River and also from the Truckee River. Water of the Truckee is carried in the Truckee Canal to Lahontan Reservoir, which is located in the Carson River drainage.

The rights to the use of Truckee River were adjudicated by the United States District Court for the District of Nevada in a case entitled United States v. Orr Water Ditch Company, by a decree dated, September 8, 1944, which contains detailed descriptions of many hundreds of water rights including claims of the United

States to Truckee River water for the benefit of the Tribe and for the Newlands Project as set out on pages 10 and 11 of the Truckee River Decree. The awards for the Tribe are designated "claim No. 1" and "Claim No. 2," have a priority of 1859 and are for the water required to irrigate a total of 17,487 acres of land on the Pyramid Lake Indian Reservation. Claims Nos. 3 and 4 cover appropriations by the United States at the Derby Dam with a priority of 1902, and at Lake Tahoe with a priority of 1903 for the Newlands Project.

Except for the United States and a very few others having water rights on each river, the parties to the Truckee River Decree are not parties to this suit, which involves only Carson River water rights, and Carson River water users are not parties to the Truckee River Decree.

The brief reference in the petitioner's statement of the case to the executive order of the Secretary of the Interior (Pet. Br. p. 6), does not adequately cover its contents. It provides "that certain designated officers in the Department of the Interior shall recommend on or before October 1, 1967, 'operating criteria and procedures' consistent with those set forth in the Regulations for the coordinated operation and control of the Truckee and Carson Rivers, '. . . in regard to the exercise of water rights of the United States, so as to (1) comply with all of the terms and provisions of the Truckee River Decree and the Carson River Decree; and (2) maximize the use of the flows of the Carson River in satisfaction of Truckee-Carson Irrigation District's water entitlements and minimize the diversions of flows of the Truckee River for District use in order to make

available to Pyramid Lake as much water as possible.'" 43 C.F.R. Sec. 418.

REASONS FOR DENYING THE WRIT

1. The decision of the Court of Appeals does not conflict with this Court's construction of Rule 24(a).

2. The decision does not conflict with applicable decisions of other Courts of Appeal.

3. "Summary Reversal" is not appropriate.

4. There is no conflict with decisions of this Court or with decisions of other courts of appeal on the issue of timeliness.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THIS COURT'S CONSTRUCTION OF RULE 24(a).

The petitioner contends that the decision of the Court of Appeals conflicts with the decision of this Court in the case of Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967). It is argued:

> "The posture of the Pyramid Lake Paiute Tribe in this litigation is closely analogous to that of Cascade. Both the Tribe and Cascade faced the prospect of a diversion to third parties of resources vital to them (here water, there gas) and both are concerned that any such diversion be made under circumstances which will not, as a practical matter, jeopardize their legitimate in-

> terests. In *Cascade*, moreover, the company was seeking intervention to protect a business relationship to which it had no pre-existing right. Here, the Tribe is attempting to protect a real property interest which, if lost, will mean the economic and cultural destruction of the Tribe." (Pet. Br. p. 11.)

The petitioner entirely misconstrues the intent and purpose of Rule 24(a) and the decision in *Cascade*. The rule requires a showing that the applicant ". . . claims an interest reating to the property or transaction which is the subject of the action. . . ." In *Cascade* this Court held that the subject of the action was the "competitive system" and this Court found that each applicant for intervention had an interest in such subject.

This case is clearly distinguishable from *Cascade*. The Court of Appeals properly pointed out that the Tribe has no water rights in the Carson River and that its claimed rights in the Truckee cannot be afffected by the decree adjudicating the water rights in the Carson.

II. THE DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF OTHER COURTS OF APPEAL.

The petitioner contends that the decision of the Court of Appeals in this case ". . . stands starkly by itself among decisions of the courts of appeal in narrowly limiting the permissible scope of intervention as of right." Four decisions of other circuits are cited to show a conflict. These will be briefly discussed.

Smuck v. Hobson, 408 F.2d 175 (C.A.D.C. 1969) invoved various policies of the board of education relating to segregation. Parents of children in the school sys-

tem sought to intervene, after judgment, to appeal the final judgment of the trial court against the board of education. The trial court had held that the Board of Education had, in a variety of ways, violated the Constitution in administering the District of Columbia Schools. The court of appeals permitted intervention under Rule 24(a) (2) holding that parents of school children have an "interest" in the education of their children and therefore an "interest" in the constitutionality of school administration. The "transaction" required by Rule 24(a) (2) which is the subject of the action is clearly identifiable as the school administration under attack. There was an "interest" in the subject of the suit which distinguishes the Smuck case from the case at bar.

In Nuesse v. Camp, 385 F.2d 694 (C.A.D.C. 1967) the court of appeals permitted a state banking commissioner to intervene in a case filed by a state bank for declaratory and injunctive relief against the United States Comptroller of the Currency alleging that the Comptroller was about to approve the opening of a competitive branch bank in the vicinity of the plaintiff's office. It said:

> "We hold that where protection of the competitive equality of state banks is the core of the federal statute controlling the branching of national banks, a state banking commissioner has an adequate interest in the construction of the federal act to justify intervention."

Here again this case is distinguishable from the instant case because there was an "interest" in the subject of the action.

Atlantis Development Corporation v. United States, 379 F.2d 818 (C.A. 5th Cir. 1967) was filed by the

United States against contractors engaged in erecting caissons on certain coral reefs of which Atlantis claimed ownership. Atlantis sought to intervene asserting its title and contending that the United States had no territorial jurisdiction, dominion or ownership of the reefs. The trial court denied intervention the court of appeals reversed, holding that Atlantis had the right to intervene under Rule 24(a) (2). The court said:

> "When approached in this light, we think that both from the terms of new Rule 24(a) and its adoption of 19(a) (2) (i) intervention of right is called for here. Of course F.R.Civ.P. 24(a) (2) requires both the existence of an interest which may be impaired as a practical matter and an absence of adequate representation of the intervenor's interest by existing parties. There can be no difficulty here about the lack of representation . . .
>
> "Nor can there be any doubt that Atlantis 'claims an interest relating to the property or transaction which is the subject of the action.' The object of the suit is to assert the sovereign's exclusive dominion and control over two out of a group of islands publicly claimed by Atlantis. This identity with the very property at stake in the main case and with the particular transaction therein involved (the right to build structures with or without permission of the Corps of Engineers) is of exceptional importance . . .

The distinction between the Atlantis Development Corporation case and the case at bar is obvious. In the Atlantis case the applicant for intervention claimed ownership of the subject of the litigation, the coral reefs, and in the present case the subject of the litigation is the water of the Carson River in which admittedly the Tribe has no right.

The case of Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97 (C.A. 2d Cir. 1970) does not involve intervention and is not in point on the facts or the law. The issuance of a permit for an expressway was the subject of the litigation and the village of Tarrytown, a co-plaintiff in the case, claimed an interest because the expressway would eventually pass through the village. There is no factual similarity with the present case and there are no legal principles applicable to both cases.

III. "SUMMARY REVERSAL" IS NOT APPROPRIATE.

The petitioner contends that "summary reversal is appropriate in view of the reasoning of the court below, the ambiguous position of the United States and its officials and the pendecy of related proceedings." (Pet. Br. p. 12.) It has failed to cite any rule of this Court, or any case authorizing the "summary reversal" of a case on petition for writ of certiorari and we have found no authority for such procedure. Under Supreme Court Rule 41 the parties are given time to prepare and file briefs on the merits which, we assume, must precede any decision on the merits of the case. Nevertheless we will comment on the points argued under the "summary reversal" heading.

The "reasoning" referred to above is apparently the following on pages 7 and 8 of appendix B:

> "The pending suit is to quiet title to water rights of the parties to the within action in only Carson River waters. The Tribe has no interest in the subject of this suit and its water rights to the Truckee River are not involved.

"The Tribe may have water rights in the Truckee other than its rights to irrigation water from the Truckee, as determined by the Court in *United States vs. Orr Water Ditch Co.*, supra, under the principle announced in Winters Doctrine, *Winters vs. United States*, 207 U.S. 564 (1908).

"In *Arizona vs. California*, 373 U.S. 546, 600 (1962), the Supreme Court states:

> 'The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as 1939 in *United States v. Powers*, 305 U.S. 527. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are "present perfected rights" and as such are entitled to priority under the Act.
>
> 'We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations.'

"The Tribe contends that the Winters Doctrine has been expanded, citing *Alaska Pacific Fisheries vs. United States*, 248 U.S. 78, 89 (1918) (fishing rights); and *Arizona vs. California*, supra.

"If The Tribe has water rights in the Truckee not vested by the Decree in the *Orr Water Ditch Co.* case, supra, they may not properly be asserted or adjudicated in the within litigation. The issues

> of any possible additional rights of The Tribe to the waters of the Truckee are not before this Court and we make no determination thereof."

The foregoing quotation is under the heading, "The Tribe is without interest in the Carson River Waters." It is properly pointed out by the Court of Appeals that the Tribe's water rights whether for irrigation or for other uses under the Winters Doctrine are in the Truckee River and are not involved in the present suit for adjudication of Carson River water rights. No other conclusion could have been reached. Every user of water on the Truckee River is a necessary party to any petition or suit to open the 1944 decree in the case of United States v. Orr Water Ditch. It is settled law that the only proper method of adjudicating water rights on a stream is to have all appropriators who use water from the stream involved in court at the same time. *People of the State of California v. United States*, 235 F.2d 647 (C.A. 9th Cir. 1956.) 2 Wiel, Water Rights, 3rd Ed. pp., 1125, 1126; *Campbell v. Wyoming Development Co.*, 55 Wyo. 347, 100 P.2d 124 (1940); *Allen v. California Water Co.*, 31 Cal. 2d 104, 187 P.2d 393 (1947). The issues in a suit for the general adjudication of water rights, such as United States v. Orr Water Ditch, are the rights of the water claimants against each other. Brooks v. United States, 119 F.2d 636 (C.A. 9th Cir. 1941).

It is the petitioner's suggestion on page 16 of its petition:

> "If the government disagrees with the reasoning underlying the Ninth Circuit's opinion, it should say so and cease its opposition to the Tribe's intervention. If it is in agreement, and will enter into a stipulation to the effect that the Newlands

> Project rights to Truckee River water are necessarily junior to the adjudicated and unadjudicated rights of the Pyramid Lake Paiute Tribe, the Tribe will withdraw its petition for intervention in this proceeding."

The suggestion is without merit because not only is the government, as only one party, interested in the priority of the petitioner's claimed right to Truckee River water, but there are several hundred others (not parties to this suit) who are interested in such right and entitled to a hearing on the issue of not only the priority, but also of the extent and nature of the right claimed under the Winters Doctrine. Any such stipulation would obviously be wholly ineffectual and has nothing to do with the adjudication of water rights on the Carson River which is the subject of this action.

IV. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR DECISIONS OF OTHER COURTS OF APPEAL ON THE ISSUE OF TIMELINESS.

Under the heading, "Timeliness is not a bar to the Tribe's Intervention," the petitioner argues the merits of the point which would be briefed if certiorari should be granted. No reasons for granting the writ such as those mentioned in Supreme Court Rule 19 are given. No conflict with any decision of this Court, or with a decision of another Court of Appeals with respect to timeliness is mentioned by the petitioner. Nor has the petitioner argued that the Court of Appeals ". . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." The question of timeli-

ness was committed to the discretion of the trial court. It was ruled upon in the accepted and usual course of judicial proceedings.

CONCLUSION

The petitioner having failed to give any special or important reasons for granting the petition for writ of certiorari and having failed to establish that the decision of the Court of Appeals conflicts with applicable decisions of this Court or with decisions of other Court of Appeal, the petition should be denied.

Respectfully Submitted,

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In the Supreme Court of the United States

October Term, 1970

UNITED STATES OF AMERICA,
Respondent,

vs.

ALPINE LAND AND RESERVOIR COMPANY, et al,
Respondents,

PYRAMID LAKE PAIUTE TRIBE,
Applicant for Intervention-Petitioner.

Case No. 927

PROOF OF SERVICE

I, E. J. Skeen, attorney of record for Respondents H. F. Dangberg Land and Livestock Company, Sierra Pacific Power Company, Fred Dressler and Johnd Winters herein, depose and say that on the 30th day of November, 1970, I served a copy of the foregoing

BRIEF OF RESPONDENTS, H. F. DANGBERG LAND AND LIVESTOCK COMPANY, SIERRA PACIFIC POWER COMPANY, FRED DRESSLER and JOHND WINTERS IN OPPOSITION TO

by placing a copy of said document in an envelope, individually addressed as follows:

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Each envelope was then sealed and deposited in the United States Mail at Salt Lake City, Utah, air mail postage thereon fully prepaid.

All parties required to be served have been served.

E. J. SKEEN

Subscribed and sworn to before me at Salt Lake City, Utah, this 30th day of November, 1970.

R. C. SKEEN
Notary Public

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 927

PYRAMID LAKE PAIUTE TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported. The memorandum order of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1970. A timely petition for rehearing was denied on October 2, 1970. The petition for a writ of certiorari was filed on November 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

410-749—70

QUESTION PRESENTED

Whether an Indian Tribe's 1968 application for intervention in this suit, which was filed 43 years earlier and involves only water rights in the Carson River, was properly denied because the Tribe claimed no rights in the Carson River and hence lacked an interest in the subject matter and because the application was untimely.

RULE INVOLVED

Rule 24(a), F.R.Civ.P., provides:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT

This suit was instituted by the United States in 1925 to quiet title to its rights and to adjudicate the relative rights of more than 400 defendants to Carson River waters in Nevada. Evidence (45 volumes of testimony and some 950 exhibits) was received between 1929 and 1940. In 1949 and 1950, temporary decrees were entered and a water master was ap-

pointed to administer the river. In 1951, the special (not water) master filed a proposed final decree which was amended in 1958. Many discussions among the parties relating to the proposed final decree followed.

Asserting water rights in the Truckee River and in Pyramid Lake, the Pyramid Lake Paiute Tribe filed a motion to intervene in 1968. Certain rights of the Tribe to Truckee River waters are set out in a decree of 1944 (*United States* v. *Orr Water Ditch Co.*, No. A3 (D. Nev.)), which specifies an 1859 priority of the Tribe in Truckee waters, as well as setting out water rights of the United States and hundreds of others. The Tribe asserted that, by reasons of the unitized operation of the Carson and Truckee Rivers and of a provision for diverting Truckee waters to the Carson to replace Carson waters used for a federal reclamation project (the Newlands Reclamation Project), the Tribe's water rights in the Truckee River are affected. Intervention was opposed by some of the defendants and by the United States.

Observing that the "'timely application' requirement of Rule 24 applies to Indians as well as other litigants" (Pet. App. B5), the court of appeals affirmed the district court's denial of the Tribe's motion to intervene because the motion was not timely. The court also ruled that, since the Tribe claims no rights in Carson River waters and the Tribe's water rights to the Truckee River are not involved in this suit and cannot be affected by adjudicating or settling rights

in the Carson, the Tribe is not affected in the "practical sense" required by Rule 24(a), F.R.Civ.P.[1]

The Tribe's petition for rehearing was denied without opinion.

ARGUMENT

The decision below is clearly correct; it does not conflict with any other decision and there is no reason for further review by this Court.

1. The Tribe has no interest in the subject matter of this suit, which is solely water rights in the Carson River. Concededly, the Tribe has rights in Truckee River waters, but, as the court below held, those rights, whatever they may be, cannot be affected by the decree in this case or by any settlement (Pet. App. B 9):

> The Tribe's interest in the Truckee has an 1859 priority and will be filled before water could be diverted by the owners of any subsequent interest or right. Any diversion to the Newlands Project, or subsequent project, which would encroach upon the earlier rights of The Tribe, would be a violation of the "Truckee

[1] The Tribe, on August 21, 1970, commenced an action in the United States District Court for the District of Columbia, No. 2506–70, against the Secretary of the Interior and the Attorney General, relating primarily to the Tribe's Truckee rights and the maintenance of "Pyramid Lake as a fishery and as a stable and viable body of water" (Pet. 9). The defendants' motions to dismiss—for failure to state a claim upon which relief can be granted and for lack of jurisdiction—are pending the Tribe's response.

River Decree", entered in the *Orr Water Ditch Co.* case.[2]

Except for assertion of Truckee water rights, there appears to be no reason for the Tribe's intervention (see Pet. 14). Litigation of water rights in a single stream is extremely complex in itself; plainly, the Tribe's Truckee claims should not be interjected into this proceeding involving only Carson water rights. *Vinson* v. *Washington Gas Co.*, 321 U.S. 489, 498.

2. Denial of intervention was also correct because the Tribe's application was not timely. Rule 24(a), F.R. Civ. P. Intervention was sought here in complex, burdensome litigation, involving numerous small parties on the Carson, some 43 years after the filing of the complaint, about 27 years after the trial was concluded, and after the death of most of the witnesses who testified from memory concerning early appropriations of Carson River waters. Further, as both courts below mentioned, the parties in this case were on the threshold of agreeing to a final decree at the time of the Tribe's application (Pet. App. A 4, B 6).

[2] Lack of an interest in the proceeding which can be adversely affected clearly distinguishes *Cascade Nat. Gas* v. *El Paso Nat. Gas*, 386 U.S. 129, and the other cases cited by the Tribe (Pet. 10–11, 16–18). Here, "The Tribe is in basic agreement with the reasoning of the Ninth Circuit" (Pet. 12), and does not show why its Truckee claims must be introduced in this case. Clearly, the Tribe's assertions of the United States' conflict of Truckee interests and failure to press the Tribe's Truckee claims in the *Orr Ditch* case are patently outside the proper scope of this case (Pet. 9, 13, 15, 20–21).

In these circumstances, the courts below appropriately concluded that intervention at this late date was not timely sought.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970